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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR MIDWEST MOTOR EXPRESS, INC., THE MPPAA SOLVENCY COALITION AND THE NATIONAL TANK TRUCK CARRIERS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*

Midwest Motor Express, Inc. ("MME"), is an interstate motor carrier of freight operating with terminals in nine mid-western states. MME has been operating under a multiemployer collective bargaining agreement with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters") covering approximately 170 employees. Currently involved in a labor dispute, MME faces a potential withdrawal liability that could destroy its economic viability and commercial existence if it is unable permanently to negotiate a new collective bargaining agreement.

The MPPAA Solvency Coalition ("the Coalition") is comprised of employers (and employer trade associations with member companies) who contribute to multiemployer pension plans in the trucking, construction and stevedoring industries. The Coalition is concerned about chronically underfunded defined-benefit multiemployer pension plans and the ability of trustees arbitrarily to increase pension benefits, especially in the trucking industry, where many employers are subject to withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA"). 29 U.S.C. § 1381-1461.[1] For several years, the MPPAA Solvency Coalition has been educating Congress and other policy makers on the severity of the problem and the need for relief.

National Tank Truck Carriers, Inc. ("NTTC") is a not-for-profit trade association whose 200 member companies specialize in the for-hire transportation of bulk materials throughout the continental United States. Many members negotiate collective bargaining agreements with the Teamsters and based upon these agreements make contributions to various multiemployer plans.

As participants in multiemployer pension plans, MME and members of the Coalition and NTTC, are subject to the withdrawal liability provisions of the MPPAA. Many of these employers participate in the Teamsters' Central States Southeast and Southwest Areas Pension Fund ("Central States"), which is a large severely underfunded multiemployer pension plan.[2] Because these em-

[1] In a highly competitive industry beset by the current economic downturn, many trucking industry employers fear they will be forced out of business and have their remaining assets stripped away by the imposition of withdrawal liability which bears no rational relationship to their reasonable expectations.

[2] Central States had an unfunded vested benefit liability of approximately $1.7 billion at the end of 1990. *Central States Southeast and Southwest Areas Health And Welfare And Pension Funds*, 1990 Annual Report at 5. *See* text *infra* at 13-17.

ployers have no influence or control over the actions of the trustees of Central States in determining or increasing benefits, the resulting withdrawal liability to which they are subject bears no reasonable relationship or rational connection to their expectations or commitments under collectively bargained contracts or under the MPPAA.

Accordingly, *amici* have a vital interest in the resolution of the constitutional issues raised under the MPPAA in this case. *Amici* believe they will bring insights and information beyond what is presented by Petitioner and Respondent, which will be useful to this Court in deciding the issues presented.[3]

STATEMENT

This case involves the constitutionality of various provisions of the MPPAA, including questions left open or reserved by this Court in *PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987) and *Connolly v. Pension Benefit Guarantee Corporation*, 475 U.S. 211 (1986). *Amici* endorse the view that "the withdrawal liability scheme and the procedural mechanisms involved in it are matters of economic life and death to many employers." Pet. at 8. As Petitioner also noted, unless the constitutional issues surrounding the MPPAA are addressed favorably, the imposition of withdrawal liability will continue to deter entry of new employers into these multiemployer plans, especially those with substantial unfunded liabilities. Pet. at 18.

The purpose of the MPPAA is to alleviate problems that discourage the maintenance and growth of multiemployer plans, to protect participants and beneficiaries of distressed multiemployer plans, and to provide a financially self-sufficient program for the guarantee of pension benefits under multiemployer plans. 29 U.S.C.

[3] This brief is filed with the written consent of the parties. The letters of consent have been filed with the Clerk of the Court.

§ 1001a (c)(2)-(4). As set forth in this brief, the MPPAA's processes, as applied in certain circumstances, have assured that these legislative goals cannot be reached. The multiemployer defined-benefit system has begun to collapse, while the multiemployer defined-contribution system, which is not covered by the MPPAA, is expanding. U.S. Department of Labor, *Trends in Pensions 1992*, Tables A-1 and A-2 at 590 and 592.

SUMMARY OF ARGUMENT

Respondent's contentions, that the Section 1401 presumptions do not deprive the employer of its right to fully challenge pension plan trustee determinations before an impartial arbitrator, and that trustees do not suffer institutional bias, plainly are wrong. The philosophy and analysis of *United Retail & Wholesale Employees Teamsters Union Local 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3rd Cir. 1986), *aff'd by an equally divided Court sub nom.*, 481 U.S. 735 (1987), again should be embraced by this Court. The legal and practical effects of the powers and presumptions of the MPPAA deny employers their due process Fifth Amendment rights to an impartial decision-maker—thereby rendering their burden not only onerous and insurmountable, but also legally untenable. *See Yahn*, 787 F.2d at 136. *See also* Connolly, *The Powers and Presumptions of the MPPAA: An Unconstitutional Combination?*, The Labor Lawyer, Vol. 3 (1987) at 83-84.

As recognized in *Yahn*, the series of presumptions contained in § 1401 of the MPPAA flow unfailingly and irrefutably in favor of the trustees. Perhaps the most significant of these presumptions relates to the calculation of withdrawal liability. As in the instant case, the withdrawing employer has no means of meeting the presumptions Congress has imposed upon it and, as a result, the employer is denied any impartiality or effective procedural due process.

Moreover, in *Connolly*, Justice O'Connor's concurring opinion focused on the potential for withdrawal liability to be held unconstitutional as applied, where there is no rational connection between collectively-bargained contributions, or with an employer's reasonable investment expectations, and a determination of withdrawal liability. In certain circumstances, the Court should conclude that the absence of such a rational connection violates the Due Process and Taking Clauses of the Fifth Amendment.

This Court should articulate the following standards under *Connolly*, for evaluating whether the MPPAA may be unconstitutional, *as applied*, where the imposition of withdrawal liability is attributable to:

(1) past unfunded vested benefits for which an employer did not ensure full funding; (2) contribution or benefit levels over which an employer has no effective control to ensure full funding, or (3) benefit increases over which an employer has no effective control to ensure full funding.

Judged against these standards, we submit that the MPPAA is unconstitutional as applied to Petitioner, and to other similarly situated employers.

ARGUMENT

I. THE § 1401 PRESUMPTIONS VIOLATE THE DUE PROCESS CLAUSE BY DENYING WITHDRAWING EMPLOYERS ACCESS TO AN IMPARTIAL DECISION-MAKER.

A. The Effect of the Statute.

The MPPAA process, delegating all initial determinations to fund trustees, becomes constitutionally flawed when coupled with the statutory presumptions accorded these determinations. The overall process denies due process of law because no neutral party ever reviews trustee determinations—no matter how unlawful, erroneous, or conflict of interest driven. Short of appellate review, the impartial adjudication required by the Fifth Amendment is nothing more than a hollow promise.[4]

Employer disputes with trustee determinations frequently involve more than just the mathematical computations involved in calculating an employer's withdrawal liability. As in the case before the Court, the initial determination that MPPAA and withdrawal liability apply in the first place may be erroneous. And, trustees often ignore the MPPAA provisions that are exculpatory in nature.[5]

Any of these initial trustee determinations are enough to overwhelm employers forced to arbitrate against trus-

[4] Federal courts have been loath to upset MPPAA's dispute resolution/arbitration provisions, and seldom grant equitable relief to an employer harmed by trustee determinations. *See, e.g., Flying Tiger Line v. Teamsters Pension Trust Fund*, 830 F.2d 1241 (3rd Cir. 1987). When equitable relief is not granted, trustee determinations, no matter how legally questionable, are certain to prevail.

[5] For example, trustees often send out notices of withdrawal during a labor dispute (such as one recently received by MME) which place undue pressure on the employer during a period of difficult collective bargaining. Except in rare instances, trucking plans have ignored the special trucking industry withdrawal rule thereby thwarting the Congressional mandate. See 29 U.S.C. 1383(d).

tee allegations presumed correct by the MPPAA. The lengthy administrative proceedings in a non-neutral forum provided by the MPPAA deny employers their due process rights.

B. The Compulsory Bias of the Statute.

Withdrawal liability is based upon a plan's "unfunded vested benefits," calculated as the difference between the present value of vested benefits and the present value of the plan's assets. 29 U.S.C. §§ 1381, 1391. Under the MPPAA, employers are liabile to a plan for their allocable share of the plan's unfunded vested benefits. 29 U.S.C. § 1381(b). The trustees of a plan decide whether a withdrawing employer is liable to the plan under the MPPAA and assess the amount of the liability. *Id.* § 1382.[6]

The initial withdrawal determination by the trustees controls the subsequent process, despite the trustee's compulsory statutory bias under the MPPAA.[7] In addition, the trustees' dual roles under MPPAA create opportunities to advance partisan interests. Withdrawal liability is one of the unions' biggest weapons in collective bar-

[6] As discussed *infra* at 10-17, the trustees of a plan may also have exclusive control of the level of unfunded vested benefits of the plan, where an employer has no effective control of benefit levels or increases. Generally, it is the trustees who, in addition to managing the plan, set benefit levels and benefit increases. *See Connolly v. PBGC*, 475 U.S. 211, 232, citing GAO/HRD-85-58, Comptroller General's Report to the Congress, *"Effects of the Multiemployer Pension Plan Amendments Act on Plan Participants' Benefits,"* 37, App. 1, Table 3 (June 14, 1985) (95% of 139 multiemployer plans surveyed provided that trustees set benefits).

[7] Under ERISA, the trustees' fiduciary duties are solely to the pension plan, and not to any particular employer. 29 U.S.C. § 1104(a)(1)(A). *See also Yahn & McDonnell, Inc., supra*, 787 F.2d 128 (3d Cir. 1986); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981) (trustees in a multiemployer plan owe an *exclusive* duty to the fund).

gaining because the liability is triggered if an employer is unable permanently to negotiate a new agreement. Union trustees, who usually are union leaders, may be tempted to threaten withdrawal liability for partisan reasons unrelated to plan management. Moreover, employer trustees who remain contributing employers have an incentive to reduce their future burden for unfunded vested benefits and to reduce competition from a withdrawing employer with limited resources by maximizing the amount of withdrawal liability attributable to the withdrawing employer.[8] Consequently, when the trustees determine withdrawal liability, they stand to gain the most by a large assessment. Therefore, trustee determinations cannot reasonably be presumed to be impartial. Nonetheless, this is the effect of the combined statutory presumptions contained in § 1401.

Aribitration does not occur *de novo*, rather the determination is presumed correct under the MPPAA. 29 U.S.C. § 1401(a)(3)(A). Judicial review of the arbitration award, in turn, is very limited in scope. In effect, unless the employer shows, by a preponderance of the evidence, that the trustee's determination was "unreasonable or clearly erroneous," the liability will be sustained in arbitration and or upon judicial review. 29 U.S.C. § 1401(a)(3)(A). *See Trustees of the Pressman Local 72 Industry Pension Fund v. Judd & Detweiler, Inc.*, 735 F. Supp. 135, (D. Md. 1988).

Similarly, the arbitrator's scope of review of the critical determination of the plan's unfunded vested benefits is presumed correct,[9] unless the employer shows by a pre-

[8] *See* Note, *Trading Fairness for Efficiency: Constitutionality of the Dispute Resolution Procedures of the Multiemployer Pension Plan Amendments Act of 1980*, 71 Geo. L.J. 161, 168 (1982).

[9] The MPPAA's presumptions extend to trustee determinations of the unfunded vested benefit liabilities of a plan upon which

ponderance of the evidence that the actuarial assumptions and methods "were, in the aggregate unreasonable . . . ," or that the plan's actuary "made a significant error" in applying the methods or assumptions. 29 U.S.C. § 1401(a)(3)(B).[10]

Charging trustees with the statutory power and incentive to maximize withdrawal liability, while providing employers, on whom the liability is imposed, with no meaningful procedural safeguards, violates procedural due process. *See Yahn*, 787 F.2d at 137-38. Although this Court's evenly divided opinion allowed that decision to stand, it has not become the law of the land.

It is astounding that, as in Petitioner's case, the actuary who determines the plan's unfunded vested benefits, and represents only the plan trustees and is paid by them, also later calculates the withdrawal liability of employers. All of these determinations are then presumed to be correct. Yet, it is a withdrawing employer, not the actuary or trustees, who bears the risk of withdrawal liability attributable to underfunding based upon the actuary's assumptions or upon benefit levels or benefit increases set by the trustees. The employer is excluded from this process and has no control over the factors affecting the funded position of the plan, including: interest rate assumptions; asset valuations; additional benefit accruals; benefit level increases; and investment experience. Therefore, it is patently unfair to presume that the actuary's calculations of unfunded vested benefits and employer withdrawal liability are correct, and to bar *de novo* review of those calculations.

withdrawal liability calculations are based. *See Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 636 F. Supp. 641 (N.D. Ill. 1986).

[10] *See Penn Textile Corp. and Textile Workers Pension Fund*, 3 E.B.C. 1609 (1982) (wherein arbitrator upheld a 6% interest rate assumption by the trustees); *See also Judd & Detweiler, supra* (use of 6% interest rate instead of 6.5% increased employer's withdrawal liability from zero to $132,775).

Furthermore, to the extent that benefit levels and benefit increases are not negotiated by an employer in collective bargaining, they are totally outside of the employer's control. This results in a highly attenuated relationship between the calculation of withdrawal liability and the employer's reasonable expectations. Nevertheless, it is the employer who is subject to withdrawal liability attributable to underfunding based upon these factors.

Accordingly, the MPPAA scheme fails to provide "a neutral and detached judge in the first instance." *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972). Moreover, *de novo* judicial review by an impartial and disinterested decision-maker is also missing. *Marshall v. Jerico, Inc.*, 446 U.S. 238, 242-43 (1980).

Consequently, we believe that the Third Circuit's ruling in *Yahn* is correct. This Court should take the opportunity provided by the instant case to establish these principles firmly for the future.

II. THE MPPAA, AS APPLIED, VIOLATES THE FIFTH AMENDMENT WHERE THE AMOUNT OF WITHDRAWAL LIABILITY BEARS LITTLE OR NO RATIONAL RELATIONSHIP TO THE CONTRIBUTIONS AND/OR EXPECTATIONS OF THE EMPLOYER.

A. The Standard.

This Court has upheld the retroactive provisions of the MPPAA under the standard that they are a rational means to a legitimate legislative end. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). In *Gray*, this Court adopted the standard in *Usery v. Turner Elkhorn*, 428 U.S. 1 (1976), for both prospective and retroactive legislation. Therefore, legislation "adjusting the burdens and benefits of economic life" is presumed constitutional and will not violate the Due Process Clause, unless Congress has acted in an "arbitrary way." *Turner Elkhorn*, 428 U.S. at 15.

Under this standard, the Court has found no *facial* constitutional problem with the MPPAA. *Connolly v. Pension Benefit Guarantee Corporation*, 475 U.S. 211 (1986). Nevertheless, as applied to Petitioner and other employers, *amici* believe that this Court's decision in *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935) "retains vitality." *See Gray*, 467 U.S. at 733-34; *Turner Elkhorn*, 428 U.S. at 19. In *Alton*, the Court invalidated provisions of the Railroad Retirement Act of 1934 that required employers to finance pensions for former railroad employees. Analogous to *Alton*, the MPPAA requires employers to finance pension benefits retroactively, and creates liabilities where none should exist. In this case, where the question is whether the MPPAA is unconstitutional as applied, *Gray* is not absolute and this Court should distinguish *Gray* and apply *Alton*.

B. Application of the Standard under the MPPAA.

As applied, the MPPAA exceeds the rational bounds of Congress' legislative goals. The statute, in effect, operates to hold employers liable for pension benefits often "created" entirely outside of their control. *See Alton*, 295 U.S. 330 (1935). Congressional intent may have originally required that employers shoulder the responsibility for their proportionate share of withdrawal liability; but, in reality, this is a legal fiction—there are no checks and balances on the creation of benefits by the trustees and, thus, artificial withdrawal liability is routinely assessed against many employers and collected from them by the trustees. Accordingly, in certain circumstances, there is no reasonable relationship between assessed liability and the employer's contributions to the plan or expectations under the terms of the plan.

We assert that the concurring opinion of Justices O'Connor and Powell in *Connolly* correctly identifies the

appropriate Fifth Amendment principles. *See Connolly*, 475 U.S. at 228-236. Withdrawal liability assessed for the benefit of employees is arbitrary and irrational in the absence of a rational connection with the employer's conduct and investment expectations. As stated by Justice O'Connor in *Connolly*:

> . . . whatever promises a collectively bargained plan makes with respect to benefits may not always be rationally traceable to the employer's conduct and that it may sometimes be quite fictitious to speak of such plans as "promising" benefits at a specified level, since to do so ignores express and bargained-for conditions on those promises. Where the plan's fixed-contribution aspects were agreed to by employees through their exclusive bargaining representatives, and where employers had no control over the level of benefits promised, employer responsibility for the benefits specified by the plan is very much attenuated, and employee expectations that those benefits will in all events be paid, in the face of plain language to the contrary, are not easily traceable to the employer's conduct.

Id. at 235-36.

The MPPAA's design, as applied, can permanently appropriate an employer's assets for the use of the Government, because the statute ultimately guarantees retirement benefits through the insurance program administered by the Pension Benefit Guaranty Corporation ("PBGC"). The MPPAA's withdrawal liability provisions are specifically designed to insulate these governmental guarantees. Thus, shouldering withdrawing employers with the burden of those benefits, beyond any meaningful input or control of the employer, is indeed a "taking," as recognized by Justice O'Connor. *See Connolly*, 475 U.S. at 228.

Whether a statute goes so far as to constitute a "taking" is an entirely separate question from the legislative power to regulate an area. *See, e.g., Pennsylvania Coal*

Co. v. Mahon, 260 U.S. 393 (1922). Here, Congress' creation of a government-sponsored guaranteed benefits program and the application of the MPPAA, under the Petitioner's circumstances, and in other circumstances illustrated in the next section, effect a "taking" within the logic of *Pennsylvania Coal. Cf. Penn Central Transportation Co. v. New York*, 838 U.S. 104 (1978).[11]

C. A Trucking Industry Example Where There Is No Rational Relationship Between Contributions and Benefits.

The facts surrounding the Petition represent a single example where an employer's benefit liabilities are not rationally related to its contributions or investment-backed expectations, but the case is by no means an isolated example. We believe that the situations of many trucking industry employers who contribute to fixed-contribution multiemployer plans illustrate some of the problems with the MPPAA, as applied, which the *Connolly* concurrence recognizes.

MME, and other trucking employers who are members of the Coalition and NTTC, are signatories to various collectively-bargained agreements, such as the Teamsters National Master Freight Agreement ("NMFA"), which is negotiated by a multiemployer bargaining unit composed of large motor carriers that control the process. Under such agreements, most of these other employers contribute to a number of multiemployer pension plans, including the Central States Southeast and Southwest Areas Pension Fund ("Central States").[12] These truck-

[11] The three relevant factors identified in *Penn Central* of "particular significance" are: (1) "the economic impact of the regulation"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the government action." *Penn Central*, 838 U.S. at 124.

[12] Central States is the largest multiemployer pension plan under ERISA, as amended by the MPPAA. It receives contributions from employers in approximately 24 states in the central and southern

ing employers are required to make weekly contributions for their employees, with an expectation, specifically set forth in the 1974 Central States' Trust Agreement, that their liability was limited to their contributions.[13] The collective bargaining agreement under which these employers contribute to Central States does not set the types or levels of benefits to be provided their employees under the plan, nor does it govern benefit increases.[14]

Thus, to the extent that the provisions of MPPAA impose liability on contributing employers for unfunded benefits that accrued in the past, the imposition of withdrawal liability assessments is a retroactive liability. Additionally, the larger employers who historically dominate the collective bargaining process have an incentive to maximize the amount of withdrawal liability which other, generally smaller, employers would face in a with-

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United States. As pointed out, it is historically the largest underfunded plan in the United States.

[13] Central States has modified its trust agreement subsequent to enactment of ERISA and the MPPAA so that it does not contain the contractual limitation contained in the 1974 Trust Agreement. This change is not in itself controlling. It is the integrated effect of Congressional regulation under the Labor Management Relations (Taft-Hartley) Act of 1947, ERISA and the MPPAA, redefining the nature and elements of collectively-bargained multiemployer pension plans, which may constitute a "taking," as applied.

[14] Further, MME and many other employer members of the Coalition and NTTC are not members of the employer groups who designate the four employer trustees to Central States. Central States permits the Southern Motor Carriers Labor Relations Association, Inc. to name one employer trustee; the Cleveland Draymen Association, Inc., the Northern Ohio Motor Truck Association, Inc., and the Cartage Employers Management Association, collectively, to name one employer trustee; and the Motor Carriers Employers Conference—Central States to name two employer trustees to its Board of Trustees. *1991 Central States Trust Agreement*, Article Two, Section 2.

drawal from Central States, whether voluntary or involuntary.[15] Consequently, these generally smaller employers, who have little or no say over the contribution levels negotiated in collective bargaining agreements, also have never had a say over the levels and amounts of benefits that Central States sets or pays its retirees or their beneficiaries. This authority rests exclusively with Central States.

As the preceding facts show, there are no checks and balances present in the MPPAA governing benefit levels and benefit increases. The history of employer contributions received and benefits paid by Central States from 1975 to 1990 indicates that, following the enactment of the MPPAA, Central States began to "mortgage the future," borrowing against current employer contributions made on behalf of current workers to pay benefits to retirees.[16] An analysis of this history demonstrates a

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[15] See *supra* note 14 and accompanying text. An involuntary withdrawal, such as a disclaimer of interest, is egregious because it is the union which fundamentally controls the decision to disclaim interest in the covered employees. When the union acts to disclaim interest, it forces a withdrawal and withdrawal liability entirely outside of the control of an employer. In contrast, the purpose and rationale of applying the MPPAA retroactively is to minimize the incidence of purely *voluntary* withdrawals, consistent with the MPPAA. Arguably, therefore, application of the MPPAA in an involuntary withdrawal is *per se* unconstitutional under the Fifth Amendment. *Compare Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025 (1982), with Justice O'Connor's concurring opinion in *Connolly*. Significantly, in *Peick*, which upheld a district court *facial* constitutional Fifth Amendment challenge to the MPPAA, the court found that ". . . MPPAA thus protects the interlocking interests of the PBGC, its premium payers, the non-withdrawing employers and the vested employees. It does so at the expense of the withdrawn employers, *the parties whose conduct threatens the harm.*" *Id.* at 1046-47 (emphasis added).

[16] *See* Appendix A. Central States acknowledges that it has utilized employer contributions made on behalf of active workers to pay for retiree pension benefits.

> Fewer active participants in each Fund, and the resulting loss of employer contributions, made it increasingly difficult to provide benefits to retirees when those benefits were paid for in

marked reversal in the ratio of contributions to benefits. *See* Chart of the *Ratio of Contributions Received to Benefits Paid by Central States from 1975-1990*, prepared by the MPPAA Solvency Coalition and attached to this brief as Appendix A. During the five-year period from 1975 to 1980, the ratio of contributions to benefits rose from 142 percent to 180 percent. Following the enactment of MPPAA in 1980, the ratio plummeted from 180 percent in 1980 to 71 percent in 1990.

This drastic trend reversal proves that there is no rational relationship between employer contributions paid to Central States and the benefits paid to retirees. Over the 15 years under review (1975-1990), what arguably may have been a reasonable relationship has become highly distorted and totally irrational—a result not foreseen by the framers of the MPPAA.

As shown on Appendix A, contributions received by Central States rose between 1975 and 1980, while benefits paid by Central States increased slightly. In this period, the level of contributions negotiated and agreed to in the Central States supplements rose from $22.00 per participant per week in 1975, to $46.00 per participant per week in 1980. *See* Central States' Supplements to the NMFA. In this period, the total number of active participants remained relatively constant.[17] Clearly, Central States managed its benefits paid during this period on a reasonable basis.

In 1980, however, Central States sharply reversed this trend. Employer contributions received by Central States increased modestly from 1980 to 1990. In this period, the total number of active participants decreased sub-

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large part by contributions made on behalf of active participants.

Central States Southeast and Southwest Areas Health and Welfare and Pension Funds, 1989 Annual Report at 2.

[17] References to active partipant data are based upon the information reported by Central States in its Forms 5500 filed with the Department of Labor.

stantially, and the contribution base declined 36.4 percent. However, the drop in the number of active participants was partially offset by an increase in the level of contributions agreed to in the Central States Supplements to the NMFA, which rose from $46.00 per participant per week in 1980 to $73.00 per participant per week in 1990.

Nevertheless, in the face of only modest increases in contributions and a substantial decline in its contribution base, Central States tripled benefits payable. Specifically, Central States increased its benefits payable after 30 years of service at age 65 from $775 in 1983, to $1,000 in 1985, and again to $2,500 in 1991.[18] It also increased its benefits payable after 30 years of service at ages 57 and 60 from $1,000 in 1985 to $2,000 in 1991.[19] These increases in benefit levels have had a frightening negative effect on the ratio of contributions to benefits.

Not surprisingly, despite ten years of excellent investment opportunities[20] since the enactment of the MPPAA, Central States remains a seriously underfunded multiemployer pension plan.[21]

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[18] *Central States Special Bulletins* 82-3, 85-3 and 91-4.

[19] *Id.* 85-3 and 91-4.

[20] Central States' investments earned 16.5 percent on average over the period from 1984-1989. *Central States*, 1989 Annual Report at 2. In contrast, interest rate assumptions of between 6 and 8 percent for purposes of calculating employer withdrawal liability during the same period have been held reasonable. *See, e.g., Penn Textile, supra* note 11.

[21] Central States' unfunded vested benefit liability was nearly $1.7 billion at the end of 1990. *See* note 2 *supra*. Moreover, based upon the figures reported in its 1990 annual report, Central States' unfunded vested benefit liability is estimated to reach nearly $2.3 billion at the end of 1991. See *Estimated 1991 Unfunded Vested Benefits Liability of Central States Pension Fund*, prepared by the MPPAA Solvency Coalition and attached to this brief as Appendix B.

Conclusively, then, in these and other circumstances, there is no rational relationship between an employer's "proportionate share of withdrawal liability," which is based on its pro-rata share of unfunded vested benefits, and the employer's collectively bargained contributions or its reasonable expectations (where pre- or post-enactment of the MPPAA). As stated by Justice O'Connor in *Connolly* on the application of the MPPAA and ERISA:

> . . . [B]oth statutes impose liability under certain circumstances on contributing employers for unfunded benefits that accrued in the past under a pension plan, whether or not the employers had agreed to ensure that the benefits would be fully funded. In my view, imposition of this type of retroactive liability on employers, to be constitutional must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility.

475 U.S. at 228.

The MPPAA's rationale rests on the proposition that, to protect employee's retirement benefits from the adverse consequences of the *conduct of employers* (i.e., from premature voluntary withdrawals from a plan), it is fair to require withdrawing employers to pay their proportionate share of the liability attributable to the plan's unfunded vested benefits. This rationale fails as applied to Petitioner's case and others such as those described by *amici*.[22]

Withdrawal liability is unconstitutional under the Due Process and Taking Clauses of the Fifth Amendment to the extent that it is attributable to: (1) past unfunded vested benefits for which an employer did not ensure full

[22] In Petitioner's case, a *unilateral* benefit increase by CLPT arbitrarily increased the unfunded vested liability of the fund and, in turn, the withdrawal liability assessed against the Petitioner. Pet. at 3 and 17-18.

funding; (2) contribution or benefit levels over which an employer has no effective control to ensure full funding; or (3) benefit increases over which an employer has no effective control to ensure full funding.[23] It is arbitrary and irrational to impose withdrawal liability on an employer, such as the Petitioner, and similarly situated employers, beyond an amount that is *rationally related* to the employer's contributions and its reasonable investment-backed expectations. *See Connolly*, 475 U.S. at 236.

[23] At a minmum, we propose that the imposition of withdrawal liability is an unconstitutional taking where a plan:

(1) is chronically underfunded;

(2) has a declining contribution base;

(3) has a declining ratio of active participants to retirees; and

(4) increases benefits that increase its unfunded vested benefit liabilities, outside of the employer's control.

This test adopts the marketplace principle that the asset owners must be risk bearers. *See* Love, *ERISA: The Law Versus Economics*, 26 Ga. L. Rev. 135 (1990). Because this inherent principle is absent under the MPPAA scheme, this Court must ensure that the arbitrary and irrational application of the MPPAA does not continue to spell the demise of the multiemployer pension plan system.

CONCLUSION

Based upon the foregoing, *amici* submit that the decision of the U.S. Court of Appeals for the Ninth Circuit in *Concrete Pipe* is incorrect, and should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

RATIO OF CONTRIBUTIONS RECEIVED TO BENEFITS PAID BY THE CENTRAL STATES SOUTHWEST AND SOUTHWEST AREAS PENSION FUND
(1975-1990)

Year *	Contributions Received *	Benefits Paid *	Ratio of Contributions to Benefits
1975	303,611,182	213,862,619	142%
1976	321,812,279	224,517,997	143%
1977	418,718,816	275,541,517	152%
1978	497,148,816	303,052,015	164%
1979	606,565,963	349,455,227	174%
1980	651,926,394	361,538,026	180%
1981	676,233,915	417,088,945	162%
1982	651,024,438	500,486,964	130%
1983	637,591,391	541,940,716	118%
1984	648,550,553	637,860,242	102%
1985	650,494,028	687,997,034	95%
1987	716,772,679	833,882,006	86%
1988	746,411,768	897,727,258	83%
1990	726,537,317	1,028,410,612	71%

(* Source: Central States Forms 5500 filed with the U.S. Department of Labor for the years 1975-1990.)

APPENDIX B

ESTIMATED 1991
UNFUNDED VESTED BENEFITS LIABILITY
OF CENTRAL STATES PENSION FUND

1990 Annual Report	
Net Assets:	$ 9,934,985,000 *
Less Vested Benefits:	$12,209,000,000 *
Estimated 1991 UVBL:	$ 2,274,015,000
Actual 1990 UVBL:	$ 1,715,215,000
One Year Estimated Increase:	$ 558,800,000

(* Source: Central States, Southeast and Southwest Areas Pension Fund 1990 Annual Report)